

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

TRANSCRIPT OF PROCEEDINGS

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IN RE: DIGITEK PRODUCT : CIVIL ACTION
LIABILITY LITIGATION : NO. 2:08-MD-01968
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: July 22, 2009
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MOTIONS HEARING

BEFORE THE HONORABLE JOSEPH R. GOODWIN
CHIEF UNITED STATES DISTRICT JUDGE
AND
THE HONORABLE MARY E. STANLEY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 P R O C E E D I N G S

2 JUDGE GOODWIN: Good morning.

3 Could you note your appearances for the record, please.

4 MR. THOMPSON: Your Honor, Fred Thompson of Motley
5 Rice for the plaintiffs' steering committee.

6 MR. FRANKOVITCH: Carl Frankovitch for the
7 plaintiffs.

8 MR. BELL: Harry Bell for the plaintiffs.

9 MR. DEAN: Richard Dean on behalf of the Actavis
10 defendants.

11 MR. MORIARTY: Matthew Moriarty also on behalf of
12 the Actavis defendants. And if I may, Your Honor, I'd like
13 to introduce two new people. You've met Madeleine McDonough
14 over the telephone. She's here today.

15 MS. MCDONOUGH: Good morning.

16 JUDGE GOODWIN: Welcome. It's good to see you.

17 MR. MORIARTY: Behind the rail is Erica James who
18 is a summer associate in our office and is also a licensed
19 and board certified family practice physician.

20 JUDGE GOODWIN: We always like to have doctors in
21 these cases, particularly when the lawyers kind of get into
22 a real big tussle. Have you had any trauma experience?

23 MS. JAMES: A little bit.

24 JUDGE GOODWIN: Welcome, Ms. James. We're glad to
25 have you.

1 I've read your submissions as is set forth in Pre-Trial
2 Order Number 16. I'll be choosing in the coming days a list
3 of no more than 20 cases. The other deadlines in the case
4 will follow on from there.

5 One of the things that is kind of an elephant in the
6 room is still the issue of venue. We're picking cases to
7 try, and we still have, in almost all of them that you've
8 selected, a venue problem. It will be resolved either by
9 you or by me. I would prefer, for a number of reasons which
10 I'll tell you about, that we do trials here. I think you'll
11 find it more convenient.

12 Judge Fred Motz of the District of Maryland is still,
13 or will be for a while longer on the multi-district
14 litigation panel. As a happy coincidence, he is also the
15 new chair of the intercircuit judge assignment panel. As a
16 consequence, I think we'll be able to facilitate my
17 assignment to any district that is required better.

18 That being said, I would rather choose these cases
19 without considering where they are. But if I have to be
20 traveling to all these places, I'm going to be considering
21 where they are in choosing the cases.

22 Moreover, when you make arrangements with another court
23 to use their courtroom and get help from a court reporter,
24 or if I take my own court reporter, we would still need to
25 get a courtroom deputy. It is not as easy to change things

1 because you are, of necessity, taking some other judge's
2 courtroom. So, we would become inflexible if we are taking
3 trials to other jurisdictions.

4 We would get the date, and that date would remain and
5 not go away under any circumstances, save a tragedy. So, I
6 would urge you to carefully consider, before I have to make
7 my decision on these cases, whether or not as to the cases
8 that I'll be selecting in the first 20 you can agree on a
9 venue waiver. I don't know if you've even talked about that
10 yet. We talked about it early in the, in the process.

11 Make no mistake, I will pack up and go wherever I have
12 to go to try the cases. I somewhat enjoy that process. But
13 it does take away the flexibility that lawyers like in
14 cases, and I'm well aware of that.

15 Are there any changes -- one proposed change was made
16 by the plaintiffs, and the defendants have objected to that
17 change. Does anybody propose any other change to the case
18 list?

19 MR. THOMPSON: Judge, not a change, but a change
20 in order. We have one that's listed as number 14. We'd
21 like to -- to the extent that the Court use these in terms
22 of a, of a preference by the plaintiffs, we would like to
23 move the 14 to a higher position if, if that's okay.

24 JUDGE GOODWIN: Hang on a second until I get the
25 plaintiffs' list. Where do you want to move it to?

1 MR. THOMPSON: Number 10.

2 JUDGE GOODWIN: There it is. So, I take it on
3 both sides you have -- both parties have listed the cases in
4 order of priority in terms of your desires. That is, if you
5 listed it case number one, that's the one you want to try
6 first.

7 MR. THOMPSON: Judge, for the plaintiffs, we --
8 the answer to that is "yes." Not -- there's not a giant
9 hierarchy. It's not as though, oh, my heavens, we've got to
10 have number one. But we made an effort to list them from
11 top to bottom.

12 With a little bit of thought, perhaps one of the ways
13 to respond to the defendant's objection as to Williams would
14 be to put 14 into the spot that was occupied by Williams.

15 But, here again, what I want to indicate to the Court
16 is that we would view the, the case 14 as one that we would
17 like to be, to be higher on the priority list. That's --

18 JUDGE GOODWIN: I would think by the time we get
19 down to case number 14, period, in trial that we'll be so
20 good at it that it will move rather rapidly after that.

21 Mr. Moriarty, are yours in order of preference?

22 MR. MORIARTY: They actually are not, Your Honor.
23 And we're not inclined to sit and try to parse out which is
24 the priorities. So, we're going to leave it to your
25 discretion after this presentation.

1 JUDGE GOODWIN: Let me ask you another question to
2 both sides. We'll start with you since you're already
3 there.

4 MR. MORIARTY: I'm getting my exercise.

5 JUDGE GOODWIN: Since the -- since you've had the
6 opportunity to review the list the plaintiffs elected, have
7 you seen anything on their list that strikes you as
8 interesting in terms of trying?

9 MR. MORIARTY: Let me answer that in the negative
10 in that we find somewhere between five and ten cases that we
11 believe are inappropriate selections for reasons that Ms.
12 McDonough will address later.

13 JUDGE GOODWIN: All right.

14 MR. MORIARTY: They either came with 20 pages of
15 medical records, or they came yesterday while I was in the
16 car driving to Charleston, or they came with no PFS, no
17 medical records, no authorizations. So, --

18 JUDGE GOODWIN: What about the other 10?

19 MR. MORIARTY: There are -- we have charts that
20 we'll show you. There are certain ones that we have no
21 procedural objections to.

22 JUDGE GOODWIN: All right. Have you taken a look
23 at the defendant's?

24 MR. THOMPSON: Judge, only the, the -- yes, sir,
25 yes, we have.

1 JUDGE GOODWIN: All right. Do you find any of
2 those of interest to be tried from your perspective?

3 MR. THOMPSON: Judge, we have --

4 JUDGE GOODWIN: What I'm saying is, are there any
5 cases that you can agree on that should be tried?

6 MR. THOMPSON: Judge, we have plenty of criticisms
7 for the defense cases. There is actually a very interesting
8 bright line as to the diagnosis of digoxin toxicity, which I
9 think we'll all get into later. And I don't want to
10 suddenly grab the floor and pull forth with my criticisms.
11 So, let me just say that --

12 JUDGE GOODWIN: I'll wait and hear -- I guess what
13 you're telling me is, from both sides, I should wait and
14 hear what you have to say, and I'll do that.

15 MR. THOMPSON: Yes, sir.

16 JUDGE GOODWIN: The other thing is Judge Stanley,
17 who doesn't run down the hall and tattle on you, but we had
18 a chance to talk briefly before this hearing. I won't speak
19 for her except that I get the impression she's not very
20 happy with some of the things that she's been seeing.

21 I would hope that since I have before me a group of
22 lawyers who have wonderful reputations that you would live
23 up to them. I'll just leave it at that.

24 Let me start with the plaintiff. Let me let you
25 address your selection of the cases.

1 MR. THOMPSON: Yes, Your Honor. Thank you.

2 Judge, we --

3 JUDGE GOODWIN: And to the extent you feel
4 necessary, address theirs.

5 MR. THOMPSON: Yes.

6 Your Honor, I'm not going to address these in a great
7 deal of detail. I will immediately respond to your
8 suggestion with regard to the siting of the trial of these
9 cases.

10 As you recall, at an early point we suggested that a
11 direct filing into the MDL was an appropriate way of having
12 a proper venue. And we also have noted that Judge Fallon
13 very successfully tried a series of cases in the Eastern
14 District of Louisiana and, in fact, dragged those cases to
15 the western, the Southern District of Texas in Houston after
16 the hurricane and tried a substantial number of cases, five
17 of them.

18 And we think that certainly there are large advantages
19 to having the MDL judge in his familiar surroundings for the
20 trial of the case. So, that certainly is going to be our
21 continuing position, as it has been all along.

22 The first case that we've nominated is a case, Mimi
23 Rivera-Vega which is a case from Houston, Texas. The case
24 lawyer is a very well regarded, a very strong advocate, and
25 who can be counted upon to give a, a strong work-up of the

1 case.

2 JUDGE GOODWIN: Who is that?

3 MR. THOMPSON: Mr. Williamson. John O'Quinn has
4 been associated with that case. It's not clear that he'll
5 be the trial counsel, but Mr. Williamson has a reputation in
6 his own right. And Shelly Sanford is also associated with
7 that case. And, so, that will be the first one.

8 This is a young woman. She had a complex cardiac
9 history prior to her, her death from the digoxin. But I
10 want to point out -- you'll see this in every single case.
11 It's a definitional aspect. You do not get digoxin unless
12 you have a rhythm or a congestive heart failure problem.

13 And, so, we'll see a complicated medical history and
14 we'll see a confounding element in every single case that we
15 talk about today. So, we don't view that of itself as
16 anything special. And, in fact, that's going to give us
17 what we're looking for with these -- I don't want to use the
18 term bellwether cases, but they certainly are the first
19 cases, and they certainly are the cases whose work-up is
20 going to give insight into how these issues play out.

21 And we think that this is a case -- it's a young woman.
22 She had very strong treating physicians from a renown heart
23 clinic who are going to provide causation testimony with
24 regard to the role of digoxin. We think that the proof is
25 there.

1 And this is a case -- frankly, the first two cases --
2 and let me just say this. These are cases that have enough
3 of a damage element to make them - how else do I say - that
4 makes them worth spending the Court's resources of three to
5 four weeks of trying a case to support the, to support that
6 effort. So, that's our, our first selection.

7 There is a hepatic overlay with the case. But, here
8 again, as I say, this is a case where the medical testimony
9 will be by very strong Denton Cooley type, clinic type
10 cardiologists.

11 The second case that we nominate is Kathy McCornack who
12 is the executor of Daniel McCornack who is a 45-year-old man
13 who had a death, who died. Let me put it that way. He was
14 a long-term stable on digoxin, and then had a sudden
15 unraveling.

16 This is one of the cases, I believe, that Mr. Moriarty
17 referred to as a latecomer that was just filed recently. It
18 was direct filed. In fact, he's absolutely correct about
19 this.

20 If you'll recall at our last meeting, I asked for an
21 additional 30 days. It was for the purpose of allowing
22 Mr. Ernst the opportunity to file this case directly and
23 have it in the pool so that the cases could be, it could be
24 included for consideration in this case of Mr. Ernst.

25 He is the former president of the California Trial

1 Lawyers Association. He's very -- he's a strong, although
2 sole, practitioner. We think that he has the ability to do
3 a spirited and a complete work-up. And it will give a case
4 that gives us a real opportunity to see what the issues are
5 and how they, how they, how they unfold.

6 This was direct filed, but the plaintiff's venue would
7 either be the Southern or Central District of California if
8 you're going by the plaintiff's domicile.

9 The third, Jacqueline Fox, is a -- here again, this
10 begins to try -- what we've tried to do is to select a range
11 of cases ranging from death cases, ranging from a serious
12 and sudden onset with a young person.

13 This would be a case where you have a sort of very
14 typical presentation of a 76-year-old. She was -- in April
15 of '08 just prior to the recall, she was found unconscious,
16 had a very high digoxin level. She had renal problems that
17 led to her death. And she -- so, that will be the third.

18 The attorneys for that case are not quite so
19 accomplished, but we do think they would do an appropriate
20 job of proving up, of addressing the issues of that case.

21 JUDGE GOODWIN: You know what. Let me, let me
22 suggest at this point, Mr. Thompson, that -- I'm starting to
23 think how long this might get. Why don't we move -- instead
24 of going through your entire list which you have also
25 provided some explanation of --

1 MR. THOMPSON: Yes, sir.

2 JUDGE GOODWIN: -- why don't we go to the
3 criteria -- well, let me hear what you think about the
4 suitability of the cases the defendants selected. I don't
5 mean to interrupt your train of thought, but I just think
6 that might be easier.

7 MR. THOMPSON: Judge, I do want to say that the
8 Fox case is my case.

9 JUDGE GOODWIN: Okay.

10 MR. THOMPSON: I did want to finish that thought.

11 Judge, the, the defendants -- and just let me say this
12 by overview. It's not criticism. It's them playing their
13 side of the net, and playing an aggressive side of the net.

14 They've chosen this opportunity to put before the Court
15 cases that they believe are going to demonstrate their point
16 to the Court that many of these cases are, have deep
17 difficulties, many of these cases have a failure of a, --
18 there's not a lab test that shows digoxin toxicity, and that
19 there are confounders.

20 What they've done by taking that opportunity to, to put
21 forward, in essence, symbolic cases is to put forward a
22 series of cases that really cannot be tried. Many of these
23 cases are going to have to be dismissed at some point during
24 the discovery period. And that's no great, no great
25 surprise.

1 What we're dealing with here, because of our PTO 16,
2 we're dealing with a universe of maybe 260 to 280 cases
3 which are early filers. There was a, a substantial number
4 of cases that have not been brought that are being
5 assembled, being looked at. But these are the cases that
6 are being, that have been brought forward.

7 And we do think there are enough cases from which we
8 can pick and go forward with good cases that are going to
9 lay out the substantial differences of opinion and either
10 meet some causation legal threshold that will be decided by
11 the Court, or will present a jury issue of persuasion with
12 regard to the strength of proof of defect or proof of, of
13 some bad pill in commerce and some health effect from the
14 adulterated pill. We do think there are enough cases to do
15 that.

16 But our general criticism of the defense cases is that
17 they have picked a substantial number of cases that cannot,
18 that will not move through until the end of the -- and
19 present those kinds of trial cases that are worthy of the
20 Court's expenditure of labor and time.

21 The only reason to try the initial set of cases is to
22 provide insight -- I don't mean to say only. But a, a large
23 reason for these early cases is to allow the plaintiffs to
24 be tempered in their enthusiasm by reality, and maybe have
25 the defendants be tempered in their enthusiasm by reality.

1 It's, it's, it's an opportunity to test the positions
2 with regard to circumstantial proof of, of adulterated
3 pills, of the causation issues, and of the, particularly the
4 issue of confounding underlying health conditions.

5 We don't view the confounding health conditions as, as
6 an obstacle at all. As we said at the outset, it's
7 definitional. People don't take this drug unless they have
8 a heart condition. People with heart conditions have kidney
9 problems. People with heart conditions have obstructive
10 pulmonary disease. Elderly people have a whole host of
11 systemic problems.

12 That's all, of course, well-known to makers of digoxin.
13 And certainly it provides them with a heightened notice that
14 variability in dosage is much more important to people who
15 are, by nature, brittle.

16 So, those cases, we think that rather than a sort of a
17 default position where the Court would call upon 10 and 10
18 and pick 10 plaintiffs' picks and 10 defense picks, our sort
19 of blanket criticism is that in this case, given the number
20 of cases that really just don't register, that the Court
21 might contemplate going and looking at the plaintiffs' picks
22 in its desire to pick out cases that will provide insight
23 into the, into the, the final trial, the final issues of the
24 case. That's the general criticism.

25 The second criticism --

1 JUDGE GOODWIN: Mr. Thompson, let me interrupt you
2 for just a second.

3 MR. THOMPSON: Yes, sir.

4 JUDGE GOODWIN: Do I understand you to be saying
5 that the plaintiffs know which cases are their weak cases
6 and that there's no real point in trying those? Is that
7 what you're telling me?

8 MR. THOMPSON: Judge, I -- no, that's, that's more
9 than, than I can say today.

10 JUDGE GOODWIN: More than you would say on the
11 record.

12 MR. THOMPSON: I can say that of the 15 picks that
13 have been put forward by the defendants, that in the --
14 that, that a substantial number of those cases, given the
15 weakness of the medical records, and not just given the
16 weakness of the medical records, but in certain cases given
17 the transient nature of the claimed illness, those are cases
18 that cannot be or should not be profitably pursued.

19 For example, if you have a transient injury or need to
20 ledger \$300,000 in work-up expenses where the up side of
21 that case for that client might be \$60,000 is a terrible
22 disservice to that client. That client really shouldn't be
23 saddled with the burden of the entire litigation. That's,
24 that's one of my points.

25 As far as, as individual cases, I think we could go

1 through the descriptions that have been provided by the
2 defendants and pick those out line by line, but I do think
3 the descriptions are quite, quite clear.

4 I will say one final thing. As you read the
5 defendant's descriptions, I do think that the, there is a
6 difference between having a digoxin level which is read as
7 being within standard parameters and there not being a
8 digoxin test at the time of the illness.

9 It's our strong position, and will be our position in
10 future proceedings, that circumstantial evidence and
11 symptomology are sufficient for a reviewing physician to
12 find a, a digoxin implication in, in the presentation of the
13 health problem.

14 The reason that we see that is that when you're dealing
15 with an elderly population with underlying heart problems
16 and someone dies of a heart problem, the first impulse is
17 not suspicion. The first impulse is, oh, Fred had a pretty
18 good run and it's too bad that he's gone.

19 Only by careful review and only by careful parsing out,
20 and certainly only by finding out and seeing the, the
21 ingestion of the, of the recalled product could a, a
22 physician on sufficient alert go back and make that opinion.
23 That's going to be our future position. So, --

24 JUDGE GOODWIN: Let me talk to you more generally
25 about the, what the plaintiffs' steering committee, the

1 defense steering committee, and the Court might hope to gain
2 by selecting, doing discovery, and then trying, for lack of
3 a better word, bellwether cases.

4 It is apparent to me that if I put cases on the list
5 for trial which the parties, the party selecting it or the
6 party on the opposite side of the case, believe to be a case
7 that's going to go away on summary judgment or one that is
8 appropriate for serious consideration on summary judgment,
9 is that what we, is that what we want on that list? Is that
10 what we're looking for?

11 The one thing that you said that gives me great concern
12 is I recognize in these cases how expensive it is to prepare
13 a particular case for trial and take it to trial. I think
14 the Vioxx cases were a million eight or something like that
15 per trial. And that was with Judge Fallon limiting all the
16 cases to three weeks, I believe, of trial.

17 So, I understand that. And I would understand that we
18 need cases that are going to teach the parties something and
19 the Court something about the cases.

20 Now, that doesn't mean that we should select the
21 plaintiffs' best cases for trial. Otherwise, I'd just let
22 you choose them. It, it does mean that we take cases where
23 there are serious claims and serious defenses and the record
24 can be fully developed factually and legally in those cases.

25 The development of those cases that we -- the way we've

1 structured our pre-trial order also gives the parties a, a
2 view of the case before we would get to these trial dates.
3 And that is -- another goal is which, which ones of these
4 two hundred and some cases do we want to look at closely to
5 evaluate what kinds of claims these are, what kinds of
6 defenses do we have, and then if we get to the bellwether
7 trials, what are they worth, and how will they go down
8 before a jury?

9 So, I'm not saying anything you haven't thought about.
10 I'm simply saying that I'm not -- I'm looking for cases that
11 are representative on some level of the 245 or how many ever
12 cases there are now. They keep coming.

13 The -- obviously, I have an interest in trying a
14 serious case, one of the best cases the plaintiffs have. I
15 want to see what it's worth. Obviously, I want to see a
16 case that exemplifies the best defenses that the defendants
17 have in a case.

18 If it -- and now I'm talking without information, which
19 always gets me in trouble, but I'll simply say this. If
20 there is little or no evidence of digoxin toxicity and no or
21 little evidence of ingestion of this drug and no or little
22 evidence of a causal connection between the physical
23 condition or damages suffered by the patient and the
24 ingestion of hard drugs, well, you know, I don't know what
25 that tells us. It just tells us it's not a very good case.

1 It doesn't really -- I mean, I don't need all of the
2 defendant's experts to try two or three cases to say to me,
3 "Judge, they didn't have any proof."

4 What I need is ones where the defendant's experts are
5 able to deal with issues of the variable toxicity of the
6 drug, for example, under different circumstances.

7 I don't know exactly, and don't pretend to know, much
8 about this drug. And I expect I'll, by the time I'm
9 finished, I'll know more than I ever wanted to know about
10 it, and you'll teach me. But we're looking for cases where
11 we could all learn something.

12 Now, the plaintiffs, more so than the defendants, have
13 competing values or interests. The plaintiffs' steering
14 committee represents a very large number of lawyers with a
15 very large group of cases. Each of those lawyers has an
16 interest in seeing that their case, and many of them will
17 think their case is the only case worthy of trial, is dealt
18 with and given priority.

19 Sometimes, I would suspect, the individual lawyer's
20 evaluation of the case and its importance in the scheme of
21 things may vary from what the plaintiffs' steering committee
22 thinks. I don't know that, but I suppose that could happen.

23 So, as we continue your remarks -- and I know Mr.
24 Moriarty has a slide show for me -- I want you to keep in
25 mind and emphasize for me for my consideration why a

1 particular case is one which will benefit all of us in the
2 regard or in the respect that I've outlined here.

3 You had something. Yes, sir.

4 MR. THOMPSON: Judge, I do want to correct one
5 impression. I sometimes -- I know this is going to be
6 shocking to the Court, but sometimes I'm guilty of
7 hyperbole.

8 The -- when I suggested that a case might be low value
9 and that it would be a hardship in that particular case, I
10 want to assure the Court that it's the plaintiffs' steering
11 committee's intention and full undertaking that any case
12 selected is going to be fully prepared and, and the product
13 that will be put forward to the Court for decision, there's
14 not going to be that consideration. We will do what we need
15 to do.

16 JUDGE GOODWIN: Absolutely I understand that, Mr.
17 Thompson. And I selected the able counsel that I did for
18 the plaintiffs' steering committee knowing that that would
19 be the case. So, I don't doubt that. But a candid look at
20 meeting the goals that I've talked about, and which I'm sure
21 all of you have thought about, will be the most helpful to
22 me.

23 I don't necessarily think it's helpful -- well, I mean,
24 I can read your papers. On the other hand, I guess what I
25 need is what you started to do. Just tell me what you think

1 about this situation in more general terms. And then I'll
2 let Mr. Moriarty talk in more general terms. And then
3 perhaps I'll be better able to question him.

4 I'm just trying to lead us through a process, and I'm
5 not sure that I didn't get off the trail in my leadership.
6 So, let me go back to Mr. Thompson.

7 Mr. Thompson, just address generally what you hope to,
8 that the Court will do when considering each of these cases
9 for selection.

10 MR. THOMPSON: Judge, my perspective is that the
11 central issues of these, of this case is going to be the
12 medical causation issue and the proof of an adulterated or a
13 nonconforming pill that participated in that causation.

14 In that regard, it's not necessary, it's not essential
15 that the Court pick cases where there is a diagnosed digoxin
16 toxicity, although you will find it in, I believe, all 15 of
17 our selections.

18 We have gone to that in order to reduce or to have one
19 less confounder in the initial wave because we view the
20 battlefield as showing an adulterated product that could be
21 or was, and is going to have to be most likely in terms of
22 circumstantial evidence, was available to be consumed, was
23 consumed in a way that could produce the health effect. I
24 think that's going to be -- in the end, that's where we'll
25 all be fighting it out.

1 To the extent that I'm talking about quality assurance,
2 manufacturing, good manufacturing practice, the FDA
3 inspections, the FDA 483 forms, the various responses, I'm
4 just going to have a big smile on my face for that whole
5 time. To the extent that we're talking about medical
6 causation and we're talking about the, the adulterated,
7 nonconforming pill to the consumer, that's going to be
8 difficult for me.

9 So, if we take cases where there's a digoxin toxicity
10 and we start and we take that off the table, then we have a
11 case where this issue is going to be pretty squarely
12 presented.

13 Let me just take one example. The Thrasher case that's
14 been nominated by the defendants, they -- within their
15 factual statement they say that Ms. Thrasher was diagnosed
16 with a high level of digoxin. The doctor's report says that
17 she was taking a double dose a day, that that's charted
18 somewhere in the medical records.

19 Her testimony is that she wasn't doing that. Her
20 testimony is that the, she was taking the proper dose and
21 that her level was caused by a, a -- it must be the pill.
22 Okay?

23 That is a very interesting factual departure. And you
24 could easily see that ending up going to the jury on that
25 issue. Who's telling the truth? Is it the medical record

1 or is it Ms. -- or is it the, or is it the patient?

2 Unfortunately, however the jury answers that question
3 doesn't push the litigation down the road. That is a
4 confounding -- that's a side issue that creates a case which
5 is going to be very interesting to try. But should it be
6 one of the first three trials?

7 We, we think that that's a case that has a substantial
8 and, you know, frankly, fascinating side issue, you know. I
9 love cases like that. If you believe me, I win. If you
10 believe them, then they win. I love that. But,
11 unfortunately, that's not going to help value cases.

12 And, so, we think that that is a case that's better
13 coming on in the second wave or a little further behind.
14 That's an example of the confounding issues.

15 To me, a range of ages, a range of health conditions,
16 and even a range of the, the, the pre-existing disease may
17 be helpful. Certainly, the two things that are needed on
18 these cases are proof of a recalled product and, two, proof
19 of, of some health effect from it.

20 And the easiest way is almost to surrender into Mr.
21 Moriarty's position that I think we've heard many times that
22 digoxin toxicity is a prerequisite for, for these cases.

23 We, in fact, have selected cases where that is in the
24 medical records so we can concentrate on the issue of
25 adulteration and health effect from that, from that product.

1 I do think it's appropriate to have in the first trial
2 group cases in which there is not a lab-tested digoxin
3 toxicity, but one in which there was no test, but there was
4 symptomology because that's going to be an important issue.

5 I believe that that is going to be an appropriate and
6 proper way and a convincing way to prove this case simply
7 because, as I've said before, these cases arise -- there's
8 not a great indicia of suspicion if somebody with a heart
9 condition dies of a heart condition. You know, sometimes
10 they just call the coroner and you go on down the road.
11 There's not a, "Oh, my heavens, why did this happen to, to,
12 to this? We've got to do a PM."

13 Oftentimes there, there may be a necessity to prove
14 that by circumstantial evidence. I believe that. The
15 defendants believe that digoxin toxicity is a prerequisite
16 to being convincing.

17 So, I think cases that fall into that category are
18 going to be very instructive to both sides. So, I do think
19 that would be a criteria.

20 I think if I continued to go down my list, I'm going to
21 replot the same ground probably for the third time. And,
22 so, let me, let me just cede the floor and answer questions.

23 JUDGE GOODWIN: Thank you, Mr. Thompson.

24 Mr. Moriarty.

25 MR. MORIARTY: Good morning, Your Honor.

1 JUDGE GOODWIN: Good morning.

2 MR. MORIARTY: We have -- the manual on complex
3 litigation addresses in several different places selection
4 of test cases. We have come here today with a little bit
5 different approach.

6 What we want to do is we submitted our selections well
7 in advance, the descriptions. So, what we want to do today
8 is two things.

9 I'm going to talk about general principles. I'm going
10 to talk about medicine. And I'm going to put this all in
11 context so that we might help the Court see what a
12 representative case might be.

13 We're going to talk a little bit about the drug itself
14 and how these plaintiffs come before you. And then --
15 that's my job. And then Ms. McDonough is going to talk
16 about specific cases of the plaintiffs that should not be
17 selected and why. Okay?

18 So, I have hard copies of our PowerPoint presentation
19 if the two of you wanted to take notes directly on this.
20 I'll give a copy to plaintiffs' counsel if they'd like it.
21 Can you boot up my laptop?

22 JUDGE GOODWIN: It should be. All you need to do
23 is push the button on your, on the table there. It should
24 be -- the plaintiffs' table should be on.

25 MR. MORIARTY: You need to push the button for the

1 defense table.

2 JUDGE GOODWIN: Oh, I got it.

3 MR. MORIARTY: Okay. So, back in, back in last
4 September, we were asked to submit a statement about what
5 this case was about. This screen is an excerpt from the
6 statement we filed with Your Honor back then. And it just
7 tells you again what this drug is about.

8 Now, the people who get digoxin products of any brand,
9 whether it's the name brand Lanoxin, the name of which you
10 will see throughout these medical records, or whether they
11 got the Actavis product Digitek, it doesn't really matter
12 because these are given to very, very sick people for two
13 reasons: Atrial fibrillation and congestive heart failure.
14 Okay? And that's what this says.

15 Those diseases themselves are caused by and accompanied
16 by a whole host of other medical problems. They're
17 typically given to people who are elderly.

18 And this is what we think is representative. This is a
19 medical record from one of the cases that we designated,
20 Mr. Butts. This is from one of his admission history and
21 physicals and what they claim in their PFS as a key time
22 period. And you can see the highlighted portion talks about
23 the medical problems. He was getting this for
24 cardiomyopathy and congestive heart failure.

25 But the things that are in here are sort of typical of

1 what you would see if you, Your Honor, were to go through
2 the medical records and look at these in detail, which we
3 know you don't have time to do.

4 We actually have a binder of abstracts and medical
5 records from our 15 cases. If you want us to leave this
6 with you so that you can go through it at your leisure,
7 we're happy to do that.

8 But this is what you will typically see. We think that
9 this, as Mr. Thompson conceded, is representative because
10 this is sort of the package. Everybody's going to have
11 different ones. But within this sort of binder, this is
12 kind of typical.

13 Now, this group of people, the elderly people and these
14 people who are at risk because of their severe heart
15 disease, lung disease, diabetes, et cetera, are going to
16 wind up in the hospital. They're going to die. And as Mr.
17 Thompson points out, the question is always going to be:
18 What's the cause? And he talks about these confounders.

19 Well, that's a very important issue in these cases
20 because this is the detailed patient label. This is the
21 digoxin label. It's patterned after the Lanoxin label, all
22 FDA approved labeling. But because our client's product is
23 a generic, it's essentially the same label.

24 And this gives you a little bit -- and this was
25 produced in discovery already. This gives you just a little

1 bit of idea of the confounders that are sort of running
2 through the threads of these cases and that we can get into
3 in more detail if we need to.

4 Body weight. Okay? Even the beginning says everybody
5 is a little bit different. They're sensitive, and you have
6 to think about the individual circumstances of these people.

7 Body weight, renal function, which I'll discuss more in
8 a second, patient's age because advanced age is a problem
9 with diminished renal function even in the face of normal
10 laboratory studies, and other disease states or drugs. And
11 when we say "or drugs," this is from a, a standard
12 cardiology test called Braunwald.

13 And you'll see, if you look in these cases and as we
14 will go through them in discovery, a lot of these patients
15 are on these drugs that affect, one way or another, the
16 pharmacodynamics or the pharmacokinetics of how this drug is
17 metabolized and potentially increase the digoxin level. So,
18 here's another one of Mr. Thompson's confounders.

19 And then this is another table from the literature that
20 just talks about: Here are some of the causes of digoxin or
21 digitalis toxicity. People can take too much for any number
22 of different reasons; reduced volume of distribution -
23 you'll see a lot of this with drug interactions -
24 hypothyroidism; reduced elimination; renal disease.

25 Let me dwell on that for just a second, Your Honor,

1 because when you look through the plaintiffs' summaries, and
2 even the defense summaries, you will see renal issues
3 repeated over and over and over again.

4 The plaintiffs are claiming in their PFS's that digoxin
5 causes renal failure, causes death, hospitalization. These
6 cases -- some of these cases must be selected because they
7 actually have it backwards. And those kind of cases are
8 going to be important test cases up front because as you can
9 see from the product labeling and this sort of table, it's
10 not digoxin toxicity causing renal disease. It's the other
11 way around.

12 And the plaintiffs, in order to weed out some of these
13 cases, those cases have to be put up amongst the mix of the
14 first 20. And that will be a point of a lot of scientific
15 rigor in these early cases.

16 So, we're talking about toxicity. That comes up over
17 and over again. Mr. Thompson makes a point of that.

18 But before I get there, this is the kind of lab result
19 that we're talking about when we're talking about the renal
20 issues. This is from Mr. Klopping's medical records, a
21 defense presentation case. And you can see in those
22 highlighted sections, his blood urea nitrogen is
23 substantially elevated. Creatinine is substantially
24 elevated. The standards are on the left. His results are
25 on the right.

1 And then the estimated glomerular filtration rate, the
2 last one of those, a more modern, sensitive test of kidney
3 function, is also substantially diminished.

4 These are the kind of things that will run through
5 almost every one of these cases. Almost every plaintiff on
6 both sides of the table has substantial renal issues which
7 make digoxin toxicity, regardless of brand, regardless of
8 dose, a distinct possibility.

9 Now, key general principles. The plaintiffs have to
10 prove exposure which is to a defective product, not just to
11 our product; what that dose is; and what the duration of
12 exposure is.

13 Nothing in their case selections really address this
14 point that's going to be flushed out because to date there's
15 no evidence of it. They've got one case with a "maybe."

16 This is a drug, regardless of who you are or what your
17 problems are, you can go from therapeutic one day to toxic
18 the next, or subtherapeutic the next. It's a difficult
19 thing to control because in the elderly, their electrolytes
20 get out of balance. Their renal conditions are poor. All
21 kinds of things happen.

22 There are a lot of reasons why people become toxic,
23 which is from those earlier slides. And the medical
24 literature will show, Your Honor, when we ultimately get to
25 a science day and a *Daubert* hearing that in the medical

1 literature, digoxin is one of the most frequent causes of
2 adverse drug reactions in the elderly. And these studies
3 have gone on for years and have nothing to do with defective
4 products.

5 Now, when we talk about toxicity, this is what we're
6 talking about. You will see in our charts and in our tables
7 that we provided you our summaries, digoxin is referred to
8 in two ways, elevated SDC, or serum digoxin concentration,
9 and clinical diagnosis of digoxin toxicity.

10 This is what we're talking about when we talk about an
11 elevated SDC. This is the lab test in one of the cases.
12 This is Dorothy Robertson, a case out of Maryland. Her
13 digoxin level is 2.3. And you can see in that particular
14 hospital, the scale was -- I think that says .8 to 2.2.

15 That is the elevated level we're talking about. That
16 in and of itself is not digoxin toxicity. It is just a lab
17 result. But it is going to be some evidence that both sides
18 use in assessing representative cases.

19 JUDGE GOODWIN: What -- there is a level at which
20 this drug is toxic in everybody, isn't there?

21 MR. MORIARTY: There, there probably is such a
22 level, but nobody knows what that level is. Once you're
23 getting above four, five, six and getting towards
24 life-threatening, that's probably a universal. But what the
25 medical literature says and what the experts will say is

1 that this may or may not be digoxin toxic. It could be
2 renal issues that are driving the level up. It could be all
3 kinds of things. This is just a lab result.

4 So, then what we look at is the medical records. And
5 we don't know why in this particular case, Ortra Davis, this
6 doctor diagnosed digoxin toxicity. We haven't taken
7 depositions yet.

8 It may be based only on a lab result, which we don't
9 think is a proper way to do the diagnosis, or maybe this
10 patient also had a symptom complex that, that could be
11 digoxin toxicity. It's one or the other, maybe a little of
12 both.

13 But in the tables that we've presented to you and on
14 the summaries, these are certainly key elements. And we
15 wanted you to understand what they meant so that you can
16 make decisions about whether they're representative.

17 Now, Mr. Thompson said a couple of interesting things.
18 When we get to these cases -- because you will note that the
19 defense cases, many of them have no elevated level and no
20 diagnosis of digoxin toxicity. On the plaintiffs' side of
21 their list, almost every patient does.

22 But we have heard from Mr. Thompson and his colleagues
23 over and over again that the lack of these things is not
24 that meaningful. And I've always taken from that that they
25 intend to bring in experts who will say, with the benefit of

1 hindsight, that even though no doctor thought there was
2 digoxin toxicity and the lab levels were normal, this now,
3 we look back retrospectively, and say is digoxin toxicity.

4 So, we can't remove these defense cases en banc because
5 they don't have those pieces of evidence. They filed the
6 lawsuits on those cases. They presumably have the
7 confidence that they're good cases. And, Your Honor, I
8 think you just have to take this on faith from the defense
9 group.

10 As we look at as many cases as we can with records and
11 PFS's, these are representative cases. There are dozens
12 upon dozens of cases that have no clinical diagnosis and no
13 elevated levels. And if they're representative and the
14 plaintiffs intend to pursue them, they should be among the
15 selections.

16 And now we find out today, after going through this
17 whole selection process, that the plaintiffs concede that
18 these might be cases that get dismissed somewhere along the
19 way. Well, it would have been nice if they'd told us that a
20 long time ago because we might have looked at the selection
21 process a little bit differently.

22 But as it stands today, those cases are there. The
23 plaintiffs' lawyers intend to pursue them. And they are
24 representative and need to be among the group.

25 Let me just close out my section of this. You know,

1 this whole litigation came about just about a year ago
2 because of the FDA's recall of Digitek. Okay? That's what
3 spurred all this.

4 We think it's important in selection and perspective
5 for you to know what the FDA said about this two weeks ago.
6 This is a very short excerpt of an FDA statement on their
7 website, and we've provided the link for it.

8 "In our best judgment, given the very small number of
9 defective tablets that may have reached the market and the
10 lack of reported adverse events before the recall, harm to
11 patients was very unlikely."

12 That is the context that we are going under as we enter
13 this next phase of litigation.

14 Mr. Thompson talks a lot about circumstantial evidence.
15 They're going to need it because in the overwhelming
16 majority of these cases, they will not be able to present to
17 you any direct evidence of a defective tablet that their
18 clients got which caused their digoxin toxicity. There will
19 be these confounders in every single case. But this is
20 important to know as we go forward.

21 JUDGE GOODWIN: Ms. McDonough.

22 MS. MCDONOUGH: Thank you, Your Honor.

23 Just kind of jumping right into the cases to kind of
24 get an overview of where we are, here is the status of
25 things as it was July 15th, '09, the day we needed to make

1 our trial selections. At that point, we had 377 MDL cases.
2 At that time, plaintiff fact sheets that were due totaled
3 280. We should have had 280 completed plaintiff fact sheets
4 along with the required medical records and pharmacy
5 records.

6 Of the 280, we received 225 plaintiff fact sheets at
7 that point. And we sent deficiency letters on all the rest,
8 or a few of them are about to go out now. Many of those
9 came with no records at all, no pharmacy records, no medical
10 records, no authorizations.

11 So, we were left ultimately with about 175, 178 cases
12 that at least had some amount of records. And then we
13 needed to take whatever authorizations we had and work with
14 the RecordTrak people to actually go out and collect records
15 and see what we could learn in the interim.

16 And, so, the later we got plaintiff fact sheets in, the
17 less likely we were to be able to have collected those
18 records and analyze them.

19 So, bottom line, ultimately we've been able to look at
20 128 cases out of the 280 that we had hoped to be able to
21 look at at the time that the selections were due. That's
22 less than half. That's -- it's 43 percent of the cases that
23 should have been accompanied with medical records, completed
24 fact sheets, pharmacy records, and authorizations.

25 So, that did make things difficult. I mean, we were

1 looking for all sorts of things in these medical records
2 and, yet, we had a very incomplete universe from which to
3 designate from, really a fraction of it.

4 Nonetheless, we looked at those. We looked for things,
5 as Mr. Moriarty said, is there evidence of the actual use of
6 Digitek? Many of these cases have no records that we've
7 been able to find that say the person actually used Digitek.
8 Many of them actually name a different product like Lanoxin
9 or a different generic name.

10 So, right there we've identified some that don't even
11 appear to have fit the threshold of: Did they use the
12 product in this case?

13 Then we looked for all of the things that Mr. Moriarty
14 discussed about alternative causes, causation issues, you
15 know, anything that might bear on whether these cases have
16 some potential merit.

17 In looking at that and trying to look at all of the
18 records around, we tried to find cases that were a real
19 diverse spectrum of at least representative cases of the
20 small percentage that we could look at. We did select death
21 cases. Ten of our 15 are death cases. Five are personal
22 injury cases.

23 We selected some that did have digoxin toxicity even if
24 we weren't sure whether it was Digitek or not Digitek. Of
25 those, we picked four that did have toxicity shown, and we

1 did pick 11 that did not have any evidence of digoxin
2 toxicity.

3 And I do agree with Mr. Moriarty that those are
4 important because if they are cases that should have never
5 been filed or should be dismissed or are going to be
6 continuing in this process, that would send a very strong
7 message to figure out whether some of these cases really
8 ought never have been brought.

9 So -- and they are representative. There were actually
10 many more cases we could have designated that did not have
11 represented shown digoxin toxicity. But we also tried to
12 find some that did so that we could look at the issues that
13 Your Honors have mentioned that go to the issue of, you
14 know, a triable case that might have some issues on both
15 sides.

16 Our 15 selections, therefore, were trying to represent
17 geography, which we sort of touched on earlier. We looked
18 at age. Ours range in age from 49 to 89. We looked at
19 different reasons that people might have been on digoxin.
20 Some of them were atrial fibrillation. Some were congestive
21 heart failure.

22 We looked at durations of use. Sometimes people had
23 been on digoxin for many years. That's helpful because if
24 they had been steady for many years and then suddenly were
25 not, maybe that's something that could be explored. Was it

1 somekind of toxicity or was it a medical condition that
2 changed it, or a concomitant medication that affected their
3 blood levels? Those things matter. Other medications and
4 other underlying diseases matter.

5 So, we tried to pick a whole range of things that would
6 show these differences that are going to have to be flushed
7 out by expert testimony most likely.

8 The plaintiffs' case selections. You know, as an
9 initial matter, even of the 15 that they selected, 10 of
10 them were procedurally deficient in one way or another.

11 And, actually, let's start with the very first cases
12 that they selected. And I'll go in the order that Mr.
13 Thompson used them today.

14 The first one is the Mimi Rivera-Vega case. That was
15 one that was not even in group one for possible selection.
16 The plaintiff's fact sheet was not due in that case until
17 August 31st. But on July 16th, the day after we were
18 supposed to make our proposed case selections, we got that,
19 a set of medical records and a plaintiff fact sheet on that
20 day.

21 So, it really wasn't even within the right group. But
22 that one came earlier than it should have, but still too
23 late for us to even have considered it for a trial
24 selection. So, I think because of that procedural
25 difficulty, that really maybe goes in group two, but it's

1 not proper for group one.

2 The second case that he mentioned is the Vivian Adams
3 case. First of all, the complaint in that case says that
4 the first prescription for that person actually was filled
5 after the recall. So, I'm not sure that that's going to be
6 representative of anything.

7 But in addition to that, we still don't have a
8 plaintiff's fact sheet in that case. And this is one that
9 they have designated for trial. We don't have any medical
10 records. We don't have any authorizations.

11 In addition, the plaintiff in the case is the named
12 decedent. There is no representative estate name. So, it's
13 improper in a multitude of ways and it's just not a proper
14 case.

15 The third one is the Joan Luce case. In that case, we
16 did actually receive a fact sheet but it came with fewer
17 than 30 pages of --

18 JUDGE GOODWIN: Which one are you talking about
19 there?

20 MS. MCDONOUGH: Luce, L-u-c-e. It's at the bottom
21 of the screen there.

22 JUDGE GOODWIN: All right.

23 MS. MCDONOUGH: We did receive a plaintiff fact
24 sheet for that case, but it came with fewer than 30 pages of
25 records, very scant for someone who's had multiple

1 hospitalizations.

2 From just those 30 pages of records, we were able to
3 see that there were 11 additional providers named in those
4 records, but none of those records were supplied us to. So,
5 we have requested those, but we don't have them yet.

6 So, that is another one. Maybe it would be proper for
7 group two, but it's not ripe for group one. We also got no
8 pharmacy records in that case. So, those are the first ones
9 that Mr. Thompson mentioned.

10 By my count, there are, at most, five cases of the 15
11 that the plaintiffs selected that at least appear to have
12 followed the court deadlines and have provided some records.
13 And maybe it would be helpful to the Court if I just gave
14 you the names of those cases because at least we don't have
15 a procedural objection to those cases. And that would be
16 Brenna, Little, Young, and Stevens.

17 Another case that Mr. Thompson identified and wants to
18 move up in the priority --

19 JUDGE GOODWIN: That's only four.

20 MS. MCDONOUGH: Well, you know, the other one was
21 the Williams case, but now they have removed that one and
22 have proposed the other Williams case. So, they had
23 initially had Thomas Williams, which at least was
24 procedurally proper, but they're requesting that it be
25 replaced with Wayne Williams.

1 Just as an example, Wayne Williams did not provide a
2 plaintiff's fact sheet. We sent a deficiency letter
3 advising them of that on June 22nd. The information we got
4 was missing whole sections of information.

5 We got no information on medical records, treatments,
6 pre-existing conditions, dosages, providers, the reasons for
7 the medications that he was on, the names of insurance
8 companies, the reasons for hospitalizations. We sent a
9 second deficiency letter on July 15th and have not had a
10 response.

11 So, for the plaintiffs to now designate that and
12 suggest that it be, you know, within this mix and to do so
13 six days after the date for designating trials and getting
14 that information just yesterday afternoon under these
15 circumstances I think is improper.

16 The Pinkos case is one where they have suggested that
17 it be moved up higher on the priority list. That is a -- if
18 there's one case I know of that's sort of anomalous and not
19 helpful for advancing the litigation as a representative
20 case, it's probably the Pinkos case. That one involves a
21 spoliation claim against the pharmacy that's involved. It's
22 a Texas case.

23 And there's also a pending state case- -- I'm sorry,
24 Massachusetts. I was looking at the wrong state there. I
25 apologize. So, there's also a pending state case against

1 the pharmacy, but not against these defendants.

2 So, there's the risk with that case that it could get
3 out ahead of this whole MDL. And I believe it's the only
4 one of its kind. So, for that reason, I don't think it's
5 representative or helpful for the process of picking
6 representative cases.

7 So, we could go on, but I think at least there are four
8 that we have no procedural objection to. Considering, you
9 know, the cases that didn't comply with the deadlines set by
10 the Court, it's not only an issue of fairness and prejudice.
11 I mean, in many regards the plaintiffs have already selected
12 their prioritized cases simply by filing them when they did,
13 and then not complying with the Court's deadlines so that we
14 didn't even have an opportunity to consider over 100 cases
15 for possible prioritization.

16 In a way, that is prioritizing that whole universe of
17 cases. And it does eliminate any opportunity to make some
18 meaningful suggestions to the Court from the defendant's
19 side.

20 But even apart from the prejudice and the unfairness,
21 it's a manageability problem. We only have 90 days to
22 complete the discovery on this first group of cases. And if
23 we're dealing with cases where we don't have a complete fact
24 sheet, medical records, pharmacy records, authorizations,
25 it's going to throw the whole process off even more, and

1 there isn't going to be any way to have efficient management
2 of the cases.

3 JUDGE GOODWIN: All right. Let me, let me
4 interrupt you there. I see that as a major problem as well.
5 I mentioned the discovery business earlier.

6 Mr. Thompson, that is a concern for me. How can I
7 select cases where there's no fact sheet, no medical
8 records, and they still don't have them and there's only 90
9 days to go for discovery?

10 MR. THOMPSON: Judge, the -- as I understand it,
11 the Rivera-Vega case, they have received a fact sheet. I
12 think the claim was that they had gotten it the day after.
13 My information was that it had been transmitted before the
14 deadline.

15 JUDGE GOODWIN: How about like Vivian Adams?

16 MR. THOMPSON: Vivian Pearl Adams is actually
17 still alive. There was -- the first letter saying that she
18 was deceased was improper. So, there is no need for a
19 personal representative there. The -- you know, Judge, our
20 position --

21 JUDGE GOODWIN: There's no fact sheet yet, no
22 records at all according to what the defendants say.

23 MR. THOMPSON: Judge, the information I have is
24 that it was turned in on Friday. That doesn't address your
25 concern that it's late. Our --

1 JUDGE GOODWIN: I'm concerned -- what I've tried
2 to do and what Judge Stanley has tried to do is, in
3 consultation with counsel for both sides, set schedules that
4 were reasonable and realistic and then try to enforce those
5 schedules.

6 It is unfair for me to suggest that I'm going to hold
7 defendants to a discovery deadline when they don't even have
8 the materials they need to get started.

9 On the other hand, if we start changing discovery
10 deadlines, we can't change them in individual cases or the
11 whole thing's going to blow up.

12 I am concerned, as I suggested last time, Mr. Thompson,
13 and I recognize the awkwardness of your position sometimes,
14 but I am concerned that the Court's orders with regard to
15 fact sheets and so forth have not been followed in a large
16 number of cases.

17 As I pointed out I think in a letter, I hold the
18 individual lawyers responsible. They still represent these
19 people and they have obligations. I don't intend to
20 castigate plaintiffs' representative counsel here. All you
21 can do is cajole, cheer, and do the best you can. But I
22 realize that there are other lawyers involved and they have
23 to step up to the plate.

24 All I'm saying is I am not going to pick a case where
25 the defendants start out behind the eight-ball. I'll

1 certainly let you have a chance to address each of the
2 issues raised by Ms. McDonough as to each of these cases.
3 But I'm not inclined to, to pick a case that's in that
4 posture.

5 But in a, but in a larger sense, I also don't want to
6 get stuck picking cases based on a procedural ruling. I
7 want cases that are going to be meaningful for the purpose
8 of this MDL.

9 It seems to me that it should be possible in a meeting
10 between counsel for the defendant and the plaintiffs to come
11 up with cases that --

12 Do you have your people here? Have them come on in and
13 watch.

14 MR. THOMPSON: Judge, could you wait until after
15 you finish yelling at me before you let them in?

16 JUDGE GOODWIN: Mr. Thompson, I would never yell
17 at you. I have the highest respect for you. And I want to
18 compliment you on how you have dealt with the Court in terms
19 of candor, and I am in no way quarreling with you.

20 I do see the defendants have dealt with the Court in an
21 equally fine fashion. And the points they make this morning
22 with regard to not having materials they need are important.

23 What I'm saying is I don't want these procedural
24 defects as they exist to stand in the way of us selecting -
25 let's be realistic - five or six cases that we're going to

1 try here.

2 We're not going to get to the second series of 20 cases
3 in this trial, in this MDL I don't think. I mean, we'll
4 keep following the procedure and we'll go on down the line.
5 And, you know, as long as I'm fit to do it, I'll keep trying
6 them until we try all of them as far as I'm concerned.

7 But, as a practical matter, given the quality of
8 representation I've got, I think full discovery, full
9 discovery and five or six trials is going to tell everybody
10 everything they ever wanted to know. And these cases are
11 then going to be resolved pretty quickly. That's what I
12 think, but I'm just one lawyer out of a whole room of
13 lawyers and I don't know that for a fact.

14 I've got young people coming in from one of the, two of
15 the firms in town to say hello, and I had hoped that they
16 would get to see you-all in all your glory. But perhaps
17 this would be a decent time to take a brief -- here they
18 come. This might be a decent time to take a brief recess
19 and meet one with the other, recognizing what problems the
20 defendants have.

21 And I would ask the defendants to give more careful
22 thought to what we're trying to achieve in selecting cases.
23 We're not trying to select cases that you are necessarily
24 guaranteed to win. We're meant to select cases that are
25 representative of the universe of cases which, to my

1 surprise, is a lot more than I thought it was the last time
2 I checked. Somebody's been transferring a lot of cases into
3 the MDL. We're looking for those cases.

4 And if you can sit down together today and, without
5 regard to procedural default or whatever, agree or try to
6 agree on five or six cases, we'll go that route and I'll go
7 ahead and flesh out the rest of them by whatever means I
8 can, and we'll move on.

9 Does that sound like it's a possibility?

10 MR. THOMPSON: Judge, my perspective on that has
11 been that while we agreed -- we entered into PTO 16 at the
12 outset, and it actually flows beautifully. The reality of
13 20 full discoveries with 10 to 12 depositions and, in
14 certain instances -- certainly Mr. Moriarty's pointed out in
15 certain instances there may be 13 or 14 treating physicians.
16 So, you may be talking about as many as 300 depositions over
17 90 days.

18 It was my, my hope and my perspective in discussing
19 this with the defendants that we could get straight to the
20 gritty and get a, a coherent list of, I don't know, five or
21 six, but maybe 10, and from that choose -- because all cases
22 will have problems as you go forward. There's always the
23 crazy aunt in the closet or the, you know, the thing that
24 nobody knows about.

25 But I do believe that a universe of fewer than 20 from

1 which to select trial cases is, is, is good. And I would
2 welcome an opportunity to talk with the defendants for just
3 a minute if that's okay.

4 MR. DEAN: If I could just have one minute, first
5 of all, I would agree -- I think -- at least I'm in
6 agreement - I don't know if my co-counsel are - with less
7 than, with less than 20 cases.

8 But what I wanted to say, I wanted to directly address
9 something you said a couple times, Judge. And that is what,
10 what would be in it for, for the Court to pick a case that's
11 got no evidence of an elevated level or no evidence of
12 digoxin toxicity.

13 And I will represent to the Court we have looked at
14 these. And those cases are representative, and they are
15 more than 50 percent. So, what's in it for you -- and I
16 know we have to select trial cases, but we also need to get
17 control over this docket.

18 And if we were to put a couple of cases in that
19 category that I just mentioned, we could gather some more
20 records. We could file some motions for summary judgment.
21 You could rule on those motions and set out clear
22 guidelines. And I would respectfully submit that a lot of
23 cases would disappear from your docket at that point.

24 And I would also tell you that at our last conference
25 we've been talking about the possibility of Rule 11 motions.

1 And the more I've considered that, I think that if I send
2 a -- under Rule 11 if I send a letter to a plaintiff's
3 lawyer, and then I send a proposed motion that I would file
4 21 days later, I'm convinced that these lawyers will dismiss
5 these cases and that you would never get to look at the
6 merits of these.

7 So, for that reason, I have switched course, and I
8 think the preferable course is to go the summary judgment
9 route rather than the Rule 11 route so that you can make a
10 public record as to your view on those, on those cases.

11 So, that would -- I think that would dispense
12 conceivably, you know, depending upon your ruling, dispense
13 with over half of these cases.

14 Now, I agree we've got to pick representative trial
15 cases. But I also wanted to give you the answer to your
16 question as to why we should put on the list cases that fit
17 in that "no elevated level" category. I think it's
18 important for you to have a couple of those on the list.

19 JUDGE GOODWIN: That's a very good point. I
20 recognize that these are the cases that are getting fully
21 developed, and these are the cases that meaningful,
22 dispositive motions can be filed in.

23 So, you are quite correct that to the extent you
24 believe that that's half of the cases, then it makes sense
25 to have some representatives of that half.

1 This will be fun for counsel. Why don't you retire to
2 the jury room and consider of your verdict. I would like --
3 let's, let's take a look at 10 cases total instead of 20 or
4 15 or whatever. Ten is a manageable number and would allow
5 room for, say, three of your summary judgment type
6 considerations.

7 Mr. Thompson.

8 MR. THOMPSON: No, sir, I was just waiting to --

9 JUDGE GOODWIN: Just waiting to escape?

10 MR. THOMPSON: Judge, I do need to say one thing.

11 JUDGE GOODWIN: Yes, sir.

12 MR. THOMPSON: I apologize to Ms. McDonough.

13 The -- when I identified the case as the one that I wanted
14 to move up, I simply identified it as number 14. She took
15 it as the Pinkos case which I have listed as number 12 on my
16 little list.

17 What -- the case that I wanted to advance is a case
18 that's entitled David Kelch, K-e-l-c-h, as surviving spouse
19 of Bonnie Kelch. I should have identified it by name when I
20 first went through this.

21 JUDGE GOODWIN: To save you trouble from having
22 two areas upon which to disagree or to agree, why don't you
23 see if you can agree on 10 cases and I'll put them in order.
24 Does that sound all right?

25 Okay. Would you show them into the jury room and don't

1 look for notes in the drawers. Thank you, counsel.

2 MR. DEAN: Excuse me, Your Honor. Is there a
3 point in time at which we should come back?

4 JUDGE GOODWIN: I'll come and get you. I'll give
5 you about 30 minutes.

6 MR. DEAN: Okay. Thank you.

7 JUDGE GOODWIN: That should be plenty of time.

8 Court stands in recess.

9 The students or interns or associates or otherwise
10 people associated with the legal profession seated in the
11 courtroom are, in the courtroom may be seated.

12 (Recess taken from 10:30 a.m. until 11:20 a.m.)

13 JUDGE GOODWIN: Please be seated.

14 All right. Who wants to give me a report?

15 All right, sir.

16 MR. THOMPSON: Judge, we have, we've met. We had
17 some disagreement over the plaintiff selections. And, so,
18 let me go with the defense selections first.

19 And that is that the plaintiffs have no objection to
20 the five cases -- that's the format that we elected to reach
21 an agreement on would be that the two sides would nominate
22 five cases each. And we -- plaintiffs have no objection to
23 the five cases that have been put forward by the defendants.

24 We do point out that at least one of the cases,
25 defendant, decedent Helen Gillmore, Christine Payne, is a

1 case in which the digoxin level was subtherapeutic. Instead
2 of being too high, it was too low. That makes the case a
3 little bit different. But it -- I have to agree with the
4 defendants that, in fact, one of the positions put forward
5 by the plaintiffs is that there is substantial variability
6 in the active ingredient in these medications. So, I do --
7 I'm not --

8 JUDGE GOODWIN: Which one is that?

9 MR. THOMPSON: It's entitled Christine A. Payne.

10 JUDGE GOODWIN: All right.

11 MR. THOMPSON: Decedent Helen Gillmore. So, we
12 don't object to it, but we do point out that that is a low
13 digoxin as opposed to a high digoxin.

14 With regard to the plaintiffs' selections, Your
15 Honor, --

16 Should I presume to read off all of yours or should I
17 let you do that for yourself?

18 MR. MORIARTY: Whatever you want.

19 MR. THOMPSON: Here's the defendant's selections,
20 Judge.

21 JUDGE GOODWIN: All right.

22 MR. THOMPSON: Number one is -- and I don't think
23 the order is important, but I, it may be. Ortra Wayne
24 Davis.

25 JUDGE GOODWIN: Hang on just a second. Give it to

1 me based on the number it appears on their thing now, would
2 you.

3 MR. THOMPSON: Let me pass the ball. Can I do
4 that?

5 THE COURT: Sure.

6 MR. MORIARTY: I'm going off -- do you want me to
7 go off the letter or our case chart?

8 JUDGE GOODWIN: How about the letter.

9 MR. MORIARTY: Okay. In the letter --

10 JUDGE GOODWIN: It's number 15 that one is.

11 MR. MORIARTY: Ortra Davis is 15.

12 JUDGE GOODWIN: All right.

13 MR. MORIARTY: Jeff Klopping is number five.
14 William Davis is number one. Alice Maroon is number six on
15 our list. And Helen Gillmore is number three in the letter.

16 JUDGE GOODWIN: All right. As I understand it --
17 are you placing any significance on the order?

18 MR. MORIARTY: No.

19 THE COURT: All right. The plaintiffs?

20 MR. THOMPSON: Your Honor, we have -- there will
21 be some discussion before you because our selections would
22 include several for which the defendants have pointed out
23 some procedural deficiencies. And, so, let me list out our
24 selections, and then we're at your pleasure as to how to
25 argue their worthiness.

1 Number one would be Mimi Rivera-Vega which appears as
2 number one also on our cover letter.

3 Number two would be Kathy McCornack which appears as
4 number two.

5 Number three would be Joan Luce which, which appears as
6 number three.

7 Number four would be Bonnie Kelch which appears as
8 number 14 originally, and we had asked that that be moved
9 up.

10 And number five would be William Young which appears as
11 number six on the, on the listing.

12 Judge, it's been pointed out by the defendants that
13 with regard to -- well, let's take number one and number
14 three. They've pointed out that there are incomplete
15 medical records that have been provided.

16 We can speak as to Ms. Luce. That's our case. The
17 plaintiff's fact sheet was provided certainly very timely
18 and within the Court's order. An initial portion of
19 plaintiff's records were provided, and we had ordered
20 medical records from the agreed upon, in essence, joint
21 vendor RecordTrak and had made those -- in our mind, we had
22 made the documents available.

23 Mr. Moriarty has indicated that those documents have
24 not been made available. And, in fact, the RecordTrak has
25 taken the position that these records are on order.

1 Judge, while that is a snafu, it's not a procedural
2 defect and it's one that is cured. It's one that we are in
3 compliance with the Court's directives. And we don't view
4 this as a mountain, but as a, as a straightforward matter to
5 be addressed, and it should not be an impediment.

6 Likewise, with Rivera-Vega, that plaintiff's fact sheet
7 has been fully filled out. My understanding from my
8 associate is that we -- not we, but the plaintiff's
9 attorneys, Mr. Williamson and Ms. Sanford, have supplied a
10 substantial number of medical records.

11 Certainly nobody's warranted it's a complete number of
12 medical records, but a substantial number and certainly
13 sufficient for an initial disclosure, and certainly
14 sufficient so that there should be no prejudice to the, to
15 the defendants. And we believe that that too is in
16 compliance.

17 The real case that I want to speak to, and that is the
18 Kathy McCornack case which was recently direct filed into
19 this jurisdiction, into this MDL, the appropriate domicile
20 is California.

21 Judge, that is a new case. That is a case in which we
22 have received the plaintiff's fact sheet as -- we have
23 received it, but apparently it has not been served into the
24 system. That can be cured in real-time. There is a
25 substantial number of medical records which are on CD by the

1 attorney, Mr. Ernst, which are available and can be
2 transmitted in real-time.

3 My proposal to the Court -- and I understand that
4 you've already admonished the plaintiffs for not complying
5 strictly with procedural rules. But my, my proposal to the
6 Court in order to alleviate the defendant's concerns about
7 prejudice and about start date is that if I have reference
8 to the PTO 16, I note that this Court is entitled to issue
9 its ruling on the trial selection cases no more than 10 days
10 following today's date.

11 One possibility that I would suggest to the Court would
12 be to require any defects in the filings by the plaintiffs'
13 proposed selections to be cured within that seven- to
14 ten-day period. And if not, then those cases would not be
15 permitted to be eligible to be selected.

16 But if so, we would ask the Court to permit these cases
17 because we do believe that they are substantial cases. They
18 address the substantial issues of the case. And they are
19 going to be litigated by immanently qualified attorneys to
20 ensure the Court that it's going to be the best possible
21 record. We would ask the Court to give that its
22 consideration.

23 I don't know if I went through the entire list, but I
24 think I did. Thank you very much, Judge.

25 JUDGE GOODWIN: All right. Let me hear from the

1 defendant.

2 MR. MORIARTY: We have no objection to the Kelch
3 or the William Young cases. But as Madeleine McDonough so
4 clearly pointed out earlier, the first three of their
5 selections, Rivera-Vega, McCornack, and Luce, suffer from
6 varying degrees of delinquency, total deficiency, lack of
7 record, et cetera.

8 JUDGE GOODWIN: Are there pending motions before
9 Judge Stanley on these cases where the fact sheets are
10 tardy?

11 MR. MORIARTY: I don't think on any of these three
12 because, for example -- and, you know, I've got so much data
13 in front of me. We do have a fact sheet on Luce. We got
14 that, as Mr. Thompson said, timely. But we just don't have
15 records.

16 McCornack there is no fact sheet. My memory is that
17 because this was so recently filed, it's not due till late
18 August or early September.

19 MS. MCDONOUGH: August 11th.

20 MR. MORIARTY: So, there would be no way to put a
21 motion on that. And the same is true of Vega, as a matter
22 of fact. That fact sheet wasn't due till late August, and
23 they're trying to rush that under the trial docket number
24 one. So, they sent the fact sheet --

25 JUDGE GOODWIN: I don't mean to be getting into

1 the -- well, let me address two topics, Mr. Moriarty.

2 One, Judge Stanley, at our first meeting where we
3 discussed all this, emphasized the importance of providing
4 the fact sheets in a timely way and in complying with the
5 rules. That apparently continues to be an on-going problem
6 in the case.

7 I suspect -- and I would be enthusiastically
8 encouraging of efforts to enforce those deadlines. I think
9 that they're there for a purpose and they should be
10 enforced.

11 Having said that, I am off on a slightly different tact
12 when I'm looking at picking these cases. I want to pick
13 representative cases, and I want to pick ones which meet the
14 requirements of the defendant with regard to weeding out the
15 chaff, no offense to the plaintiffs. At least that's the
16 view of the defendants or the object.

17 So, the proposal that was made by Mr. Thompson to
18 provide some of this documentation that isn't due yet, but
19 to speed it up and get it to you within 10 days, if we
20 modified our thinking in that respect -- and I haven't
21 selected these cases. But if we modified our thinking in
22 that respect, I don't see any real prejudice for this
23 isolated group of cases.

24 Now, we certainly have prejudice if we think of the
25 order continuing to pick the cases in sequence. And I can

1 tell you that this is a one-time deal as far as I'm
2 concerned if we do it this way. I want, I want to reach an
3 accommodation, but I don't want it to be a license to ignore
4 the Court's deadlines in the future.

5 So, my preference would be to ask the defendants to
6 receive the materials within the 10-day window and to
7 develop it as we otherwise would. And in the future, the
8 Court will absolutely not consider for inclusion on a trial
9 schedule any case where the deadlines of the Court have not
10 been met.

11 Can you live with that, Mr. Moriarty?

12 MR. MORIARTY: Your Honor, I can live with it.

13 JUDGE GOODWIN: I know you don't like it, but you
14 can live with it.

15 MR. MORIARTY: But can I add a couple of
16 qualifiers?

17 JUDGE GOODWIN: Sure.

18 MR. MORIARTY: If they don't have that material on
19 a day certain to be decided by you, they're out of the trial
20 group.

21 JUDGE GOODWIN: That's right.

22 MR. MORIARTY: And if they decide to dismiss
23 voluntarily any of these cases for some reason in the next X
24 number of days, that we be allowed to substitute no matter
25 who designated the case. We asked for that in our letter

1 because we thought there was a possibility that when we put
2 some of these cases up that the plaintiffs would voluntarily
3 dismiss them. So, we want to be able to designate.

4 JUDGE GOODWIN: Let me take -- let's do the first
5 part and let me keep, keep my options open with regard to
6 the second part, that is, the substitution.

7 I, I think it's clear to all of you that I want this
8 matter to be dealt with amicably and in a spirit of civility
9 and cooperation. At the same time, I expect the rules of
10 the Court to be obeyed.

11 Now, I hope that lawyers with your years of experience
12 don't sense in me somekind of weakness because I am now
13 suggesting accommodation. You would be making a serious
14 mistake.

15 So, I want to do, I want to do what Mr. Fred Thompson
16 has suggested with regard to these five cases that he's
17 identified. And I'll take your five cases as identified and
18 I'll put them in order. And then from here on out, we'll
19 cooperate by following the rules. What I think will
20 happen -- and I should confer with my colleague. Just a
21 minute.

22 (Pause)

23 JUDGE GOODWIN: No case -- I've talked with Judge
24 Stanley and we're in agreement it will be the order of the
25 Court that no case will be designated as, for a trial group

1 that is not in compliance with the Court's orders. In other
2 words, if you don't have the fact sheets, you don't have the
3 records that are required for the Court's orders, it will
4 not be included in the trial group at the time except for
5 this first attempt at accommodation. After this, that's it.

6 Do I need to spell it out anymore than that or does
7 everybody understand?

8 (No Response)

9 JUDGE GOODWIN: All right. The second group is
10 coming up when? It's within how many days?

11 MR. MORIARTY: About 60 from now I believe.

12 JUDGE GOODWIN: 60 days from now. I propose --
13 well, I don't propose. I'm going to modify the order so
14 that I select whatever number of cases I select now. It
15 says up to 20. I'll select whatever number I do. And then
16 the ones I do not select will fall to the next group for
17 possible selection. That doesn't automatically mean that I
18 will select them in the next group.

19 Is that your understanding of the order as it exists
20 now?

21 MS. MCDONOUGH: Yes.

22 JUDGE GOODWIN: Okay. Now, what else do we need
23 to do today?

24 MR. DEAN: Your Honor, I had a, just a couple of
25 items I don't think will take very long. It's the kind of

1 thing that we would typically address in our conference.

2 I'm glad to do it on the record or -- let me just tell you
3 what they are.

4 JUDGE GOODWIN: All right.

5 MR. DEAN: Number one, I wanted to make sure you
6 were aware that Judge Harris had been promoted to the
7 appellate bench, and apparently a substitution will take
8 place in the New Jersey cases. That judge has not been
9 designated yet. We had a conference with the Court
10 scheduled for August 7th. We've been told that that may or
11 may not go forward. So, I just wanted to make sure you were
12 aware of that.

13 JUDGE GOODWIN: I was. I talked with him. He
14 told me it was bad news and good news. And the bad news was
15 that, you know, that he was going to have to bail out. The
16 good news was that he was sure that whoever replaced him
17 would be even better. So, I doubt that. I doubt that. But
18 he has assured me that he will convey to the incoming judge
19 how wonderfully well we're all working together and
20 encourage them to continue.

21 MR. DEAN: The second is a report item also. I
22 will be getting a detailed letter to you between now and our
23 next conference on this, but I wanted to give you the
24 headline. And that was that most of the plaintiffs who have
25 been advancing class actions on personal injury and medical

1 monitoring have withdrawn those claims. And a substantial
2 number of claimants who had advanced economic injury class
3 actions have withdrawn those claims.

4 We will, we will get a detailed chart to you reporting
5 on that, but I just wanted to let you know that there will,
6 as best we can tell right now, there will be a handful of
7 plaintiffs going forward with class action claims. So,
8 we'll get you a very detailed chart on that.

9 JUDGE GOODWIN: Okay.

10 MR. DEAN: The third item, again just for your
11 awareness and knowledge, and that is that Judge Moss has
12 indicated that she is going to set trials in the
13 Philadelphia cases starting in September. I think she plans
14 on trying two cases in September, October, November, and
15 December. We have a *Daubert* hearing I think in Philadelphia
16 on June 15th. So, I just wanted you to be aware of her
17 schedule.

18 She is like you where we are going through a selection
19 process. It's what I would call a first-in/first-out, or
20 first-in/first-scheduled. So, any cases filed in
21 Philadelphia in 2008 are being set on the trial docket for,
22 beginning in September of 2010.

23 We have a conference with Judge Moss next, on July
24 29th, next Wednesday, which I think more detail will be
25 added to that report. But that's the quick report on the

1 Philadelphia litigation.

2 And we also have the issue of -- there's been the issue
3 of PTO 16 and we were asked to make some revisions to it in
4 light of the, some of the short continuances you've granted
5 here.

6 We have a revision to present. I think the plaintiffs
7 are substantially in agreement with what is presented there.
8 But they have -- I think they are in agreement with what's
9 in that because it dealt with the immediate issue we
10 addressed with you two judges last month.

11 But they have some additional issues to address which
12 was in light of the -- they wanted to adjust some of the
13 dates for depositions and witnesses. And we can maybe talk
14 about that at our August conference.

15 But the larger issue there, I guess, relates to
16 document production and whether the Actavis defendants are
17 going to have to produce the additional documents covered by
18 PTO 27. We obviously have our objections on file. So, that
19 may --

20 JUDGE GOODWIN: You can expect that I will deal
21 with that very shortly.

22 MR. DEAN: Right. So, that -- so, I simply wanted
23 to say there may need to be some adjustments to this
24 proposed schedule beyond what we have which immediately
25 addresses the issue you asked us to address.

1 JUDGE GOODWIN: Okay.

2 MR. DEAN: So, we have that with us, but
3 plaintiffs do have the larger issue of wanting to move back
4 some other dates.

5 JUDGE GOODWIN: Why don't we take care of that --
6 would it be all right to take care of that in August?

7 MR. DEAN: I think that's, I think that's fine,
8 yes.

9 JUDGE GOODWIN: Does that work out?

10 MR. THOMPSON: Yes, Judge. The, the dates that we
11 want to be moving are some internal deadlines with the trial
12 date, but not the trial date itself which will continue to
13 be. And those dates are all in December, January, February.
14 So, August is plenty ripe enough to take that up.

15 JUDGE GOODWIN: Fine. Along the lines that you
16 were talking, counsel, Judge Hahn has been selected in Texas
17 to handle those cases. And I've been in contact with him,
18 but we haven't gotten to talk. So, --

19 MR. DEAN: Those cases are just in the process of
20 literally being transferred from other districts in Texas to
21 him. He has not asked to see us yet.

22 JUDGE GOODWIN: And I don't know him and we have
23 not chatted. So, --

24 MR. DEAN: The only other thing I had was kind of
25 a, just a footnote on the comment I made right before we

1 broke. I was talking to you about the fact that I had
2 concluded it made more sense to follow a summary judgment
3 route rather than a Rule 11 route.

4 I do want to note for the record that I reserve the
5 right to file those Rule 11 motions. And I know clearly
6 beyond my ability to file a Rule 11 motion, the Court can
7 sua sponte raise Rule 11 issues on its own.

8 So, we do have discovery outstanding which goes to some
9 of those Rule 11 issues as to what information plaintiffs
10 would have had at the time they filed the complaint.

11 So, I certainly reserve the right to file those
12 motions, but I simply was trying to indicate to the Court
13 the value of the -- I think it would just advance the
14 litigation much more expeditiously to deal with these issues
15 by way of summary judgment. But I don't want -- I'm not
16 discarding the possibility of Rule 11. I just think the
17 other ways are more efficient.

18 JUDGE GOODWIN: We, we didn't understand you to do
19 that, and we know the two rules have very different purposes
20 and that you may very well use Rule 11 where it's
21 appropriate, and discovery in regard to that will be going
22 forward.

23 MR. DEAN: Right. I think that was all I had on
24 my list of housekeeping items. I don't know if anyone else
25 has any.

1 JUDGE GOODWIN: Anybody else have anything?

2 MR. THOMPSON: Judge, on behalf of the plaintiffs'
3 steering committee, it's, it's within our knowledge, and
4 certainly it's been driven home very clearly and deeply
5 today, that the, there is some sloppy work being done on
6 plaintiffs' fact sheets on our side.

7 I want to reassure the Court that we are going to
8 communicate with the entire list, certainly with all the
9 plaintiffs who have filed cases, the, the extent and the
10 gravity of your comments today so that we can bring these
11 into compliance. Thank you very much, Your Honor.

12 JUDGE GOODWIN: I would appreciate that very much.

13 MR. DEAN: I would just like to note finally --
14 and this is a compliment to Mr. Thompson and his group and I
15 put it on the record. And if some of the constituent
16 members read it, I hope they won't hold it against you
17 gentlemen.

18 But we -- on the class action issue we have been
19 contacting plaintiffs' lawyers to urge them to drop these
20 claims. They always say, "I want to talk to the plaintiffs'
21 steering committee." And then shortly afterwards, those
22 claims are dropped.

23 I don't know what exactly they're telling the
24 plaintiffs' lawyers, but I sense a very high level of
25 cooperation here toward an end I think we all wanted to

1 achieve.

2 JUDGE GOODWIN: You know, I don't appoint anybody
3 to any steering committee that isn't the best lawyer in
4 America.

5 MR. THOMPSON: Well, now, Judge, given the
6 implication of Mr. Dean, I want to say that when I talk to
7 my plaintiffs' attorneys, I tell them that we have an
8 overwhelmingly powerful case and it may be that in this one
9 instance they may want, for tactical reasons, to take a
10 different tact. Thank you, Judge.

11 JUDGE GOODWIN: All right. The 10 days within
12 which to, that I'm to pick these cases starts today, and the
13 curative efforts need to start today. So, whatever 10
14 calendar days, excluding the first and including the last
15 is, is when it is. I can't count on --

16 JUDGE STANLEY: You're not supposed to include the
17 calendar days.

18 JUDGE GOODWIN: You're not supposed to include the
19 calendar days? I don't know. I'll defer to Judge Stanley.

20 MR. THOMPSON: I think it's anything you say.

21 MR. DEAN: Let me just raise --

22 JUDGE STANLEY: You can say it any way you want
23 to.

24 JUDGE GOODWIN: I know I can, but -- what's the
25 rule?

1 JUDGE STANLEY: Because it's under 11, it's
2 business days and you start -- the first day is tomorrow.

3 JUDGE GOODWIN: First day is tomorrow. It's
4 business days.

5 MR. DEAN: Let me just raise this issue.

6 JUDGE STANLEY: It's all going to change
7 December 1st.

8 MR. DEAN: You've talked about a cure within 10
9 days. You've talked to us in the abstract. I guess I have
10 a question. What is a cure on some of these cases? And
11 maybe we should have a -- maybe that would be a good thing
12 for us to discuss.

13 JUDGE STANLEY: I think you should be liberal.

14 JUDGE GOODWIN: I want to move these -- I want to
15 move this first group forward. And absent some actual
16 difficulty on your part, I want to keep moving forward.

17 At the same time, if you perceive that sloppiness or
18 negligence or whatever is occurring on the other side, but
19 if everybody is working in good faith --

20 MR. DEAN: Right. That, that's understood. But I
21 guess I just want to reserve the right 10 days from now if
22 we have 100 pages of medical records or, you know, less than
23 50 --

24 JUDGE GOODWIN: You can object.

25 MR. DEAN: I will -- I may want to come back to

1 you.

2 JUDGE GOODWIN: You may. Come back to me right
3 away because I want to name these cases.

4 Anything else?

5 (No Response)

6 JUDGE GOODWIN: Thanks to all of you. I assume
7 that I'm still correct that setting hearings for the early
8 hours of a morning is still better for everybody.

9 MR. DEAN: Yes.

10 MR. THOMPSON: Yes.

11 JUDGE GOODWIN: Thanks to all of you. I'll see
12 you in August.

13 (Proceedings concluded at 11:50 a.m.)

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1 I, Lisa A. Cook, Official Reporter of the United
2 States District Court for the Southern District of West
3 Virginia, do hereby certify that the foregoing is a true and
4 correct transcript, to the best of my ability, from the
5 record of proceedings in the above-entitled matter.

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8 s\Lisa A. Cook

July 29, 2009

9 Reporter

Date

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